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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DUNG PHI LE,

Defendant and Appellant.

H036732

(Santa Clara County

Super. Ct. No. C1067671)

Defendant Dung Phi Le appeals from a judgment of conviction entered after he pleaded no contest to cultivation of marijuana (Health & Saf. Code, § 11358) and possession of marijuana for sale (Health & Saf. Code, § 11359). The trial court suspended imposition of sentence for two years and placed defendant on probation. On appeal, defendant contends that the trial court erred in denying his motion to suppress evidence. We find no error and affirm.

I. Statement of Facts

At approximately 12:30 p.m. on December 2, 2009, an assault occurred in the area of Cray Court in San Jose. The suspect, who was traveling on foot, was armed with a handgun and a shank. Several police officers set up a perimeter around Cray Court and began searching for him. The perimeter included more than 20 homes. At approximately

4:00 p.m., the San Jose Police Department SWAT team, which responds to emergency calls involving individuals who are armed with weapons, arrived to assist the patrol officers with the yard-to-yard search for the suspect. According to Officer Gustavo Perez, who was a member of the SWAT team, the perimeter had already been secured, which meant that “officers were in the area and the suspect could not have gotten out.” The officers went to each home, knocked on the door, asked the residents if they had seen anything, and informed them that they would be searching their backyards for an armed and dangerous suspect. Once the officers completed the search of a backyard, an officer would remain there until after other officers searched the next backyard, thereby ensuring that the suspect did not retrace his path.

When the officers arrived at Cray Court, Sergeant Guggiana approached Officer Perez and informed him that residents had seen the suspect jumping over fences towards 3072 Cray Court. The SWAT team continued with its systematic search of the area until it reached 3072 Cray Court, which was the last house bordering on the perimeter. Officer Perez knocked on the door, rang the doorbell, and announced, “San Jose police” several times. Though there was a car in the driveway, no one answered. The SWAT team then searched the backyard, but found no one. Officer Perez noticed that the door to the garage was “open enough for a body to get through.” Believing that the suspect could be hiding in the garage, the officers announced their presence. When they received no response, they entered the garage. They saw a car, but no suspect.

The officers checked the door leading from the garage into the house and found that it was unlocked. Officer Ruelas announced their presence in English and asked the residents to come to the door. No one responded. At that point, another officer announced their presence in Vietnamese two or three times. There was no response. Officer Perez explained that since he had recently been involved in a case in which “a suspect took shelter in a house where the occupants were home and held them at bay until

the police searched the area and left,” he was concerned that the suspect was either hiding in the house or holding the occupants against their will.

The officers entered defendant’s home and saw several marijuana plants. They then made contact with defendant, explained that they were looking for an armed suspect, and asked if they could search the rest of the house to ensure that he was not hiding inside. Defendant shook his head up and down, indicating that they could do so. The officers searched the house, but did not find the suspect. Defendant was detained, and some of the officers continued their search of the area.

Sergeant Keith Neumer, who was working a narcotics assignment, was contacted by a patrol supervisor to address safety concerns at defendant’s home. According to Sergeant Neumer, there are multiple hazards associated with “marijuana grow houses.” When he arrived, there were one or two officers with defendant inside the house and the safety considerations had not yet been addressed. After Sergeant Neumer entered the house, he observed marijuana plants in several rooms. There were also electrical cords and power converters across the floor, which could have caused a fire. In addition, the power source for the electrical system had been bypassed. According to Sergeant Neumer, this type of work was generally done by someone who was not an electrician. He immediately contacted PG&E, who then rendered the power safe.

After Sergeant Neumer obtained a search warrant, officers seized the marijuana plants, lighting equipment, financial documents, and two vehicles. The officers also eventually seized approximately \$52,000.

II. Discussion

Defendant contends that the trial court erred by denying his motion to suppress evidence. He argues that there were no exigent circumstances which would have justified entry into his home without a warrant.

“‘The standard of appellate review of a trial court’s ruling on a motion to suppress is well established. We defer to the trial court’s factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]’” (*People v. Weaver* (2001) 26 Cal.4th 876, 924, quoting *People v. Glaser* (1995) 11 Cal.4th 354, 362.)

The federal and state Constitutions prohibit unreasonable searches and seizures by the government. (U.S. Const., 4th & 14th Amends.; Cal. Const., art. 1, § 13.) A warrantless entry into a home is presumptively unreasonable. (*Payton v. New York* (1980) 445 U.S. 573, 587.) In the case of a warrantless search of a home, the prosecution bears the burden of establishing that the search “was justified by some exception to the warrant requirement.” (*People v. Camacho* (2000) 23 Cal.4th 824, 830.) One recognized exception to this requirement is the exigent circumstances doctrine. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1156 (*Rogers*).) “[E]ntry into a home based on exigent circumstances requires *probable cause* to believe that the entry is justified by one of these factors such as the imminent destruction of evidence or the need to prevent a suspect’s escape.’” (*People v. Thompson* (2006) 38 Cal.4th 811, 818, quoting *People v. Celis* (2004) 33 Cal.4th 667, 676.) “““[T]here is no ready litmus test for determining whether such circumstances exist, and in each case the claim of an extraordinary situation must be measured by the facts known to the officers.’”” [Citation.] Generally, a court will find a warrantless entry justified if the facts available to the officer at the moment of the entry would cause a person of reasonable caution to believe that the action taken was appropriate. [Citation.]” (*Rogers*, at p. 1157.)

Here, the officers had probable cause to believe that the suspect had entered defendant’s home. The officers had surrounded the area in which an assault had occurred and had been systematically searching the area. The suspect was armed with a handgun and shank, and the officers had been informed that the suspect was moving towards

defendant's home, which was on the border of the perimeter. The officers had also ensured that the suspect could not retrace his path. Though there were two vehicles at defendant's home, there was no response to several announcements of the officers' presence. Moreover, one of the officers had recently been involved in a case in which the suspect took the residents hostage until the officers left the premises. Based on these circumstances, the officers reasonably believed that entry into the home was necessary to ensure the safety of the residents and to prevent the armed suspect's escape.

The cases upon which defendant relies are factually distinguishable from the present case. In *United States v. Johnson* (9th Cir. 2001) 256 F.3d 895 (*Johnson*), when the officer approached a suspect, who had five outstanding arrest warrants for misdemeanor offenses, the suspect fled towards his mother's house. (*Id.* at p. 899.) However, the officer had a "gut feeling" that the suspect would go to the defendant's property. (*Id.* at p. 899, fn. 2.) Three officers then entered the defendant's property through a locked gate. (*Id.* at p. 900.) After there was no response when they knocked on the defendant's door, the officers began searching the defendant's property for the suspect. (*Ibid.*) When they came within one or two feet of the shed near the house, they smelled marijuana. (*Ibid.*) The officers then obtained a warrant based on their observations while they were on the defendant's property. (*Ibid.*) *Johnson* held that there was no probable cause to believe that the suspect was on the defendant's property. (*Id.* at pp. 905-906.) Moreover, in concluding that there were no exigent circumstances, *Johnson* relied on *Welsh v. Wisconsin* (1984) 466 U.S. 740, 753, which stated that "an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made.'" (*Johnson*, at p. 908.)

In *United States v. Winsor* (9th Cir. 1988) 846 F.2d 1569 (*Winsor*), the suspect, who was unarmed, robbed a bank. (*Id.* at p. 1571.) Officers followed the suspect to a residential hotel, and went from room to room looking for him. (*Ibid.*) When the officers

arrived at the room inhabited by the defendant and the suspect, they demanded that the door be opened. (*Ibid.*) After the suspect opened the door, the officers recognized him as the robber and arrested both him and the defendant. (*Ibid.*) *Winsor* held that the search of the defendant's room without probable cause violated the Fourth Amendment.

In contrast to *Johnson* and *Winsor*, here, additional facts suggested that the suspect was inside defendant's home. Officers had secured the perimeter, the suspect was seen moving towards defendant's home, defendant's home was on the border of the perimeter, and the occupants failed to respond to the officer's repeated announcements. Moreover, in *Johnson* and *Winsor*, the suspects had not committed assaults and were not armed with a handgun and a shank.

People v. Celis (2004) 33 Cal.4th 667 (*Celis*) and *People v. Ormonde* (2006) 143 Cal.App.4th 282 (*Ormonde*) also do not assist defendant. In *Celis*, the defendant was detained in a nearby alley while officers conducted a protective sweep of his home, though they had no knowledge that there was anyone in the home and the defendant was unarmed. (*Celis*, at pp. 672, 679.) In *Ormonde*, the suspect was arrested for domestic violence outside the defendant's apartment, but the officers knew that the victim was at another location and they had no reason to believe that there were any other victims or suspects inside the apartment. (*Ormonde*, at pp. 291.) Unlike in *Celis* and *Ormonde*, here, the officers entered the home to ensure the safety of the occupants and to apprehend an armed suspect.

Defendant next contends that even if exigent circumstances justified the initial entry, Sergeant Neumer's failure to obtain a warrant prior to his entry into defendant's home rendered it illegal.

People v. Duncan (1986) 42 Cal.3d 91 (*Duncan*) is instructive. In *Duncan*, the officer entered a home based on evidence corroborating a tip that a burglary was in progress. (*Id.* at pp. 95-96.) Upon entry, the officer saw glassware, bags of white powder, Bunsen burners, tubing, and containers of ether acetate. (*Id.* at p. 96.) There

was also a strong odor of ether. (*Ibid.*) Feeling dizzy and unsure what to do, the officer called a sergeant, who had more experience with illicit drug laboratories. (*Ibid.*) The sergeant arrived within five minutes, and escorted the officer out of the home due to the safety risks. (*Ibid.*) The sergeant then called a vice control officer for assistance, who addressed the safety risks by contacting the fire department and instructing the firefighters to turn off the gas and electricity. (*Id.* at pp. 96-97.)

Duncan held that the officer's initial entry was justified by the exigent circumstances of a burglary in progress. (*Duncan, supra*, 42 Cal.3d at p. 98.) Noting that "a search or seizure based on exigent circumstances ends when the emergency passes," *Duncan* then considered whether the sergeant's entry was permissible. (*Id.* at p. 99.) *Duncan* stated that "an officer was lawfully on the premises already. The second officer's entry went no further than that of the first officer, and was meant only to interpret what the first officer had already seen. The second officer's entry was thus a minimal additional intrusion on the defendant's privacy. [Citation.]" (*Ibid.*) *Duncan* also held that exigent circumstances justified the vice control officer's entry, noting that he had been informed that there was an illicit drug laboratory at the house, he smelled the ether from the driveway, he called the fire department as he entered, and the nature of the chemicals created a dangerous environment. (*Id.* at p. 105.)

Here, the officers' initial entry was also justified by exigent circumstances. "[I]n the course of conducting a reasonable search [the police do] not have to blind themselves to what [is] in plain sight because it [is] disconnected with the purpose for which they entered. [Citations.]" (*Duncan, supra*, 42 Cal.3d at p. 99.) As in *Duncan*, the officers discovered illegal drug operations and were already lawfully on the premises when Sergeant Neumer arrived to determine whether there was a safety hazard from the use of electrical devices inside the home. Thus, exigent circumstances justified Sergeant Neumer's entry.

Defendant argues, however, that the trial court failed to make any findings regarding Sergeant Neumer's credibility. He also points out that Sergeant Neumer did not mention safety concerns in his affidavit or police report.

Here, Sergeant Neumer's testimony that he entered defendant's home to address safety concerns supports the trial court's implicit finding that exigent circumstances justified his entry. Since this court must defer to the trial court's implicit factual findings (*People v. Weaver* (2001) 26 Cal.4th 876, 924), we reject defendant's argument.

In sum, we conclude that the trial court properly denied the motion to suppress evidence.

III. Disposition

The judgment is affirmed.

Mihara, J.

WE CONCUR:

Premo, Acting P. J.

Elia, J.